

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Inter-Carrier Compensation
for ISP-Bound Traffic

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CC Docket No. 99-158

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SUMMARY

The framework of intercarrier compensation for ISP-bound traffic that carriers and states have implemented under the Sections and 251 and 252 negotiation and arbitration process has served the public interest. This framework has fostered, and has been fully compatible with, the spectacular growth of the Internet and the new service options and opportunities it has created for businesses and consumers.

In this proceeding, the Commission should establish a framework to govern intercarrier compensation for ISP-bound traffic on a going-forward basis that preserves and extends the essential aspects of current treatment of this traffic. This should include an opportunity for parties to negotiate and arbitrate intercarrier compensation for this traffic pursuant to Section 251 and 252 of the Act pursuant to federal pricing guidelines that the Commission should adopt in this proceeding. Federal guidelines should require that intercarrier compensation for ISP-bound traffic be based on TELRIC, and that it be symmetrical and based on ILEC costs, unless a competitive LEC can demonstrate to a state commission that it has higher costs. The Commission should generally rely on parties negotiations and individual state arbitrations to refine and apply its guidelines to individual parties' situations. The Commission should require that rates, and requirements governing intercarrier compensation for ISP-bound traffic, be the same as those governing reciprocal compensation generally.

States have authority under Section 252 of the Act to arbitrate intercarrier compensation for ISP-bound traffic even if this traffic is jurisdictionally interstate. The Commission has recognized that the 1996 Act created a new regulatory paradigm in which states may exercise authority over some traditionally interstate matters, and *vice versa*. Further, Sections 251 and

252 contemplate that parties may negotiate comprehensive interconnection arrangements.

Intercarrier compensation for ISP-bound traffic is thus plainly within the scope of matters parties may negotiate under Section 251, and that states may arbitrate under Section 252.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	CC Docket No. 99-68
Inter-Carrier Compensation)	
for ISP-Bound Traffic)	

COMMENTS OF FOCAL COMMUNICATIONS CORPORATION

Focal Communications Corporation ("Focal") submits these comments in response to the *NPRM* issued in this proceeding.¹ Focal is a competitive local exchange carrier ("LEC") that is providing, or will in the near future provide, facilities-based switched local telephone services in Boston, Massachusetts; New York, New York; Philadelphia, Pennsylvania; Washington, DC; Chicago, Illinois, Seattle, Washington, Detroit, Michigan, major metropolitan areas in California, and other cities in the United States.

I. CURRENT INTERCARRIER COMPENSATION ARRANGEMENTS FOR ISP-BOUND TRAFFIC HAVE SERVED THE PUBLIC INTEREST

In the *Local Competition Order*,² the Commission established regulations implementing the local competition provisions of the Telecommunications Act of 1996 ("1996 Act")³ including

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket Nos. 96-98, 99-68, FCC 99-38, released February 26, 1999 ("*Dial-Up Order*" or "*NPRM*").

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, 15805-15806, paras. 694-606 (1996) (*Local Competition Order*), *vacated in part, aff'd in part*, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part* AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721 (1999).

³ Pub.L. 104-104, Title VII, Sec. 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. Sec.

Section 251(b)(5)⁴ concerning reciprocal compensation. Under the regulations implementing Section 251(b)(5), local service providers may negotiate reciprocal compensation rates and arrangements subject to an opportunity to arbitrate before state commissions under Section 252.⁵ At the time parties entered into their interconnection agreements, they assumed that the reciprocal compensation provisions of the Act and their interconnection agreements were fully applicable to ISP-bound traffic. State commissions also assumed this was the case.⁶ Thus, for

⁴ 47 U.S.C. Section 251(b)(5).

⁵ *Local Competition Order*, paras.13, 35; 47 U.S.C. Section 252.

⁶ Prior to the *Dial-Up Order*, every state commission - 28 state commissions - that examined the issue found that dial-up calls to ISPs were subject to reciprocal compensation. *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996*, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 *et al.* (Az. C.C. Oct. 29, 1996); *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc.*, Decision Regarding Petition for Arbitration, Docket No. 96A-287T (Co. PUC Nov. 5, 1996); *The Investigation and Suspension of Tariff Sheets Filed by U S West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services*, Docket No. 96A-331T, Commission Order, at 8 (Co. PUC July 16, 1997). *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252*, Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996); *U S West Communications, Inc. v. MFS Intelenet, Inc. et al.*, Order, No. C97-222WD (W.D. Wash. January 7, 1998); *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCI Metro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996); *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996), at 13, *aff'd in applicable part, US WEST Communications, Inc. v. WorldCom Technologies, Inc.*, Civil Action No. CV97-857-JE, (slip op. Dec. 10, 1998 D. Or); *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet*

Traffic, Case 97-C-1275, Order Denying Petition and Instituting Proceeding (N.Y. PSC. July 17, 1997). Letter dated September 11, 1997 from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Esq., Bell Atlantic-Maryland, *Petition of the Southern New England Telephone Company For a Declaratory Ruling Concerning Internet Service Provider Traffic*, Docket No. 97-05-22 (Conn. DPUC Oct. 10, 1997); *Petition of Cox Virginia Telcom, Inc. for Enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Va. S.C.C. Oct. 24, 1997); *Complaint and Request for Expedited Ruling of Time Warner Communications*, Order, PUC Docket 18082 (TX PUC, February 27, 1998). *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, Case No. MO-98-CA-43, June 22, 1998; *Petition For Arbitration of Unresolved Issues For the Interconnection Negotiations Between MCI and Bell Atlantic - West Virginia, Inc.*, Order, Case No. 97-1210-T-PC (W.Va. PSC Jan. 13, 1998); *Consolidated Petitions of Brooks Fiber Communications of Michigan, Inc., TCG Detroit, MFS Intelenet of Michigan, Inc. and Brooks Fiber Communications of Michigan, Inc. against Michigan Bell Telephone Company, d/b/a Ameritech Michigan and Request for Immediate Relief*, Order, Case Nos. U-11178, U-11502, U-11522, U-11553 (Mich. PSC Jan. 28, 1998; *In the Matter of Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, LLC*, Order Concerning Reciprocal Compensation for ISP Traffic, Docket No. P-55, Sub 1027 (N.C. Util. Comm. Feb. 26, 1998); *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois, et al.*, Docket Nos. 97-0404, 97-0519, 97-0525 (Consol.), Order, (Ill. C.C. Mar. 11, 1998); *In the Matter of the Petition of Birch Telecom of Missouri, Inc. For Arbitration of the Rates, Terms, Conditions, and Related Arrangements for Interconnection with Southwestern Bell Telephone Company*, Arbitration Order, Case No. TO-98-278 (Mo. P.S.C. Apr. 23, 1998); *Re: Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG-Milwaukee, Inc.* Letter from Lynda L. Dorr, Secretary to the Commission, Public Service Commission of Wisconsin, to Rhonda Johnson and Mike Paulson, dated May 13, 1998; *In the Matter of Brooks Fiber Communications of Oklahoma, Inc. et al. For An Order Concerning Traffic Terminating To Internet Service Providers and Enforcing Provisions of the Interconnection Agreement With Southwestern Bell Telephone Company*, Case No. PUD 970000548, Order No. 423626 (June 3, 1998); *Petition for Declaratory Order of TCG Delaware Valley, Inc.*, Docket No. P-00971256, (June 16, 1998); *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-00118, voted to Affirm Hearing Officer, June 2, 1998; *Complaint of ICG Telecom Group, Inc., v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation*, Case No. 97-1557-TP-CSS, Opinion and Order (PUCO, Aug. 27, 1998); *Complaint of World[Com] Technologies, Inc. Against BellSouth Telecommunications, Inc., for Breach of Terms of Florida Partial Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief*, Docket No. 971478-TP, Final Order Resolving Complaints, Order No. PSC-98-1216-FOF-TP (Fla. PSC Sep. 15, 1998); *Complaint of WorldCom Technologies, Inc. against New England Telephone and Telegraph Company d/b/a*

all practical purposes, the framework that the Commission established for reciprocal compensation generally was applied by the industry and state regulators to ISP-bound traffic. It was not until the Commission's *Dial-Up Order* that the industry and state regulators received the startling news that, in fact, this traffic was not subject to reciprocal compensation under Section 251(b)(5) of the Act, and that, consequently, the Commission had no rules governing reciprocal compensation for ISP-bound traffic.⁷

Bell Atlantic-Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116, Decision (Mass. D.T.E., October 21, 1998); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service* (Rulemaking 95-04-043); *Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service* (Investigation 95-04-044), Opinion, Decision 98-10-057 (Cal. P.U.C., October 22, 1998); *Complaint of MFS Intelenet of Georgia, Inc. Against BellSouth Telecommunications, Inc., and Request for Immediate Relief*, Order Affirming and Modifying the Hearing Officer's Decision, Docket No. 8196-U (Ga. P.S.C. Dec. 28, 1998); *Connect Communications Corp. v. Southwestern Bell Telephone Co.*, Order, Docket No. 98-167-C, Order No. 6 (Ark. P.S.C. Dec. 31, 1998); *Public Utilities Commission Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii*, Decision and Order, Docket No. 7702 (Hawaii P.U.C. Jan. 7, 1999); *Complaint Against US WEST Communications, Inc., by Electric Lightwave, Inc., Requesting the Utah Public Service Commission to Enforce an Interconnection Agreement Between Electric Lightwave, Inc., and US WEST Communications, Inc.*, Order, Docket No. 98-049-36, (Utah P.S.C. Jan. 22, 1999); *Complaint of Time Warner Communications of Indiana, L.P., Against Indiana Bell Telephone Company, Inc., d/b/a Ameritech Indiana, for Violation of the Terms of the Interconnection Agreement*, Cause No. 41097 (Ind. U.R.C. Feb. 3, 1999). See also *Emergency Petitions of ICG Telecom Group, Inc. and ITC^DeltaCom Communications, Inc. for a Declaratory Ruling*, Docket 26619 (Ala. P.S.C. Mar. 4, 1999); *Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc.*, Docket No. 981008-TP, Order No. PSC-99-0658-FOF-TP, issued April 6, 1999.

⁷ Focal intends to intervene in pending appeals of the *Dial-Up Order* and does not endorse that decision's determinations concerning jurisdiction or application of Section 251(b)(5) to dial-up calls to ISPs.

Focal submits that the regulatory framework that parties and state authorities applied to ISP-bound traffic under the assumption that this traffic was subject to Section 251(b)(5) was nonetheless appropriate and served the public interest. Current intercarrier compensation arrangements for ISP-bound traffic have fostered the growth of Internet services and enabled incumbent and competitive LECs to meet the increasing needs of consumers and businesses to access ISPs in efficient and cost-effective ways by enabling them to recover the costs of carrying this traffic. Consumers have benefitted from greater service choices. Incumbent LECs have benefitted from growth in subscriber lines, vertical services, and high capacity sales to ISPs. . Current inter-carrier compensation arrangements for this traffic have helped contribute to, and are fully compatible with, the transformation of the Internet into one of the key features of the robust and successful telecommunications sector of the United States economy. Focal submits, therefore, that current intercarrier compensation arrangements have served the public interest and that the Commission in moving forward with this rulemaking should be guided by the goal of continuing the current regulatory framework that industry assumed was applicable to governing intercarrier compensation for ISP-bound traffic.

II. PARTIES SHOULD BE PERMITTED TO NEGOTIATE INTERCARRIER COMPENSATION RATES SUBJECT TO AN OPPORTUNITY FOR ARBITRATION

Focal strongly supports the Commission's tentative conclusion that intercarrier compensation arrangements for ISP-bound traffic should be established in the first instance by parties' voluntary negotiations.⁸ As noted in the *NPRM*, negotiated intercarrier compensation

⁸ *NPRM*, para. 29.

rates are most likely to lead to economically efficient outcomes.⁹ Private parties are in the best position to identify and establish prices that will provide a fair compensation in light of current and developing technology and expected traffic patterns. Parties are also best able to tailor intercarrier compensation arrangements to particular circumstances faced by the parties, if any, that should be addressed by special arrangements. Similarly, re-negotiations of existing agreements, rather than new regulatory frameworks, provide an adequate mechanism for incumbent LECs to address their concerns about intercarrier compensation for ISP-bound traffic under existing agreements. A regulatory scheme in which the Commission or states set rates by generic proceedings would be a cruder instrument than individual negotiations conducted by the parties for achieving rates and arrangements that will be fair to both parties.

Relying on voluntary negotiations to set intercarrier compensation for ISP-bound traffic is also likely to be less burdensome to regulators. This approach is also most consistent with the goals of the 1996 Act to create a "pro-competitive, deregulatory national policy framework" for provision of telecommunications services in the United States.¹⁰ Accordingly, Focal recommends that the Commission provide that parties may negotiate intercarrier arrangements for ISP-bound traffic.

At the same time, however, parties must be afforded an opportunity to arbitrate before a regulatory authority any issues that they are unable to resolve through voluntary negotiations.

⁹ *Id.*

¹⁰ Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996)("Joint Explanatory Statement")

Incumbent LECs continue to possess the overwhelming share of the local service market.¹¹

Competitive LECs remain dependent on reasonable terms of interconnection with incumbent LEC networks, including for intercarrier compensation, in order to function as viable local service providers. Absent an opportunity for arbitration, incumbent LECs will be able to thwart competitive entry by denying competitive LECs reasonable intercarrier compensation for ISP-bound traffic. Experience has also shown that incumbent LECs will unilaterally engage in self-help to prevail in their self-serving points-of-view concerning intercarrier compensation for ISP-bound traffic. Accordingly, the Commission should establish that parties may negotiate intercarrier compensation arrangements for ISP-bound traffic subject to an opportunity to arbitrate unresolved issues before regulators.

III. ARBITRATIONS SHOULD BE CONDUCTED BY STATE AUTHORITIES UNDER SECTION 252

Focal urges the Commission to determine that parties may arbitrate issues concerning intercarrier compensation for ISP-bound traffic before state authorities under Section 252 of the Act. State authorities have experience in this area since they have been conducting arbitrations concerning this traffic under Section 252 since 1996. They additionally have the resources to do so and have procedural rules in place.

Focal seriously questions whether the Commission would be able to conduct the arbitrations for this traffic if arbitrations are likely to arise from carriers in the fifty states, the District of

¹¹ Competitive LECs and Competitive Access providers accounted for less than 2% of local service revenues in 1997. *Local Competition Report*, Industry Analysis Division, Common Carrier Bureau, December 1998, p. 9.

Columbia, and United States Territories and Possessions. The Commission's resources are already strained, and it is under pressure to downsize, not expand regulatory programs. The Commission has only a very few staff assigned to the "Rocket Docket" complaint resolution process.¹² It is not realistic to expect that the Commission could devote significant resources to conducting arbitrations.

Moreover, the Commission can most efficiently assure that the pro-competitive goals of the Act are met by establishing guidelines for states to follow in arbitrations, rather than conducting arbitrations itself. Accordingly, the Commission should determine that arbitrations of intercarrier compensation for ISP-bound traffic should be conducted by state authorities pursuant to Section 252 of the Act. As we discuss below, states have authority under Section 252 to conduct arbitrations for this traffic. The Commission should also determine that if a state fails to conduct an arbitration then the Commission will do so pursuant to Section 252(e)(5).¹³

IV. BROAD FEDERAL PRICING GUIDELINES ARE NECESSARY

While state authorities should be able to set rates in arbitrations requested by parties, Focal recommends that the Commission apply to ISP-bound traffic its general approach established in the *Local Competition Order* for implementation of the local competition provisions of the Act under which states are largely responsible for implementation and enforcement of the local competition provisions of the Act, including reciprocal compensation,

¹² *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Second Report and Order, 13 FCC Rcd 17018 (1998).

¹³ 47 U.S.C. Section 252(e)(5).

pursuant to federal guidelines. Thus, with respect to pricing issues generally, including reciprocal compensation, the Commission should establish pricing guidelines while states set the actual rate in arbitrations pursuant to those guidelines.¹⁴ The Commission should generally rely on parties and individual state arbitrations to refine and apply its broad pricing guidelines to the context presented by particular interconnection agreements.

In addition, broad pricing rules along the lines of those adopted in the *Local Competition Order* will not be unduly obtrusive of state authority. The option of using proxy rates where no rates are currently in effect pending setting permanent rates would assure that federal pricing guidelines are not burdensome or infeasible for states to implement.

Moreover, it is not as if the Commission must invent new pricing guidelines in this area. As explained below, the pricing rules governing reciprocal compensation for other traffic are fully appropriate for ISP-bound traffic. Accordingly, the Commission should in this proceeding simply adopt its current reciprocal compensation pricing rules for application to ISP-bound traffic. As noted, this is what the parties and state regulators assumed was the case anyway and this approach has served the public interest.

V. INTERCARRIER COMPENSATION SHOULD BE BASED ON TELRIC

Congress' overarching goal in the 1996 Act was to create a competitive environment for the provision of local telecommunications services.¹⁵ In the *Local Competition Order*, the Commission determined that pricing of incumbent LEC services and elements based on a

¹⁴ *Local Competition Order*, paras. 1027-1118.

¹⁵ *See* n. 9, *supra*.

forward looking cost methodology was necessary to achieve the competitive goals of the 1996 Act because, in a competitive, efficiently operating market environment, service providers will set prices based on forward looking costs.¹⁶ The Commission chose Total Element Long Run Incremental Cost ("TELRIC") as an appropriate forward looking cost methodology to implement the local competition provisions of the Act.¹⁷ The Commission also determined in a separate proceeding that interstate access charges should also be based on a forward looking cost methodology but did not set interstate access charges on that basis instead choosing to rely on a market-based approach that would rely on competition to drive interstate access charges down to forward-looking costs.¹⁸ Focal submits, therefore, that the Commission should additionally determine that intercarrier compensation rates for ISP-bound traffic should also be based on TELRIC.

Focal emphasizes that TELRIC is the appropriate pricing methodology for ISP-bound traffic even under the Commission's view that this traffic is jurisdictionally interstate and even if the services provided to ISPs are regarded as interstate access. As noted, the Commission has determined that interstate access rates should ultimately be based on TELRIC. In addition, there is no reason to assume that the costs experienced by incumbent and competitive LECs in originating and terminating local calls are any different than those involved in originating and

¹⁶ *Local Competition Order*, paras. 620, 672, 1054.

¹⁷ *Id.*

¹⁸ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, Report and Order, CC Docket Nos 96-262, 94-1, 91-213, and 95-72, 12 FCC Rcd 15982 (1997), para. 44.

"terminating" long distance calls. Thus, the core switching and transport functions are identical for both kinds of traffic. There is no reason, and, in fact, it would be a giant step backwards for the Commission to require that the current scheme of interstate access charges with all its problems, play any role in intercarrier compensation for ISP-bound traffic. Accordingly, the Commission should require that states set rates for this traffic based on TELRIC. The Commission should specify that TELRIC should be determined in accordance with the requirements specified in the *Local Competition Order* including a reasonable allocation of overhead.

VI. STATES SHOULD HAVE THE OPTION OF USING FCC PROXY RATES

In the *Local Competition Order*, the Commission adopted proxy rates that states could use in situations where they had not yet set rates based on TELRIC. Focal urges the Commission to adopt this approach for ISP-bound traffic in analogous situations for ISP-bound traffic, *i.e.* in situations where the parties do not have intercarrier compensation rates in effect arrived at either through voluntary negotiations or through arbitrations. In these situations, the proxy rate is a useful alternative and probably the only feasible one pending state TELRIC proceedings.

However, the Commission's proxy rates were adopted when no parties had established any rates under the 1996 Act. Focal submits that a flash-cut to proxy rates is not likely to be appropriate three years into the Act in situations where the parties already have rates in effect. Accordingly, in situations where parties have not yet determined prices based on TELRIC and the parties request arbitration, it will probably be more appropriate and less disruptive to the parties to continue current rates in effect pending arbitrations or TELRIC proceedings. Accordingly, the Commission should not mandate application of proxy rates but should permit

states the option of maintaining current rates in effect pending any proceedings underway to set rates based on TELRIC. Of course, if current rates are based on TELRIC they may remain in effect permanently, or if voluntarily negotiated, may remain in effect until the agreement is renegotiated pursuant to its terms and conditions.

The Commission should also determine that competitive LECs may obtain the proxy rate on an interim basis pending completion of negotiations for an initial interconnection agreement. This will help assure that competitive LECs are not unduly delayed in seeking to provide initial service.

VII. SYMMETRY - STATES SHOULD USE ILEC COSTS AS THE BASIS FOR SETTING RATES

The Commission should also require that intercarrier compensation rates for ISP-bound traffic be symmetrical, *i.e.* the rate will be the same for both directions, and that it be based on an examination of incumbent LEC costs. As discussed in the *Local Competition Order*, there is no reason to assume that the TELRIC costs of an incumbent LEC would be any different than those of the competitive LEC.¹⁹ Moreover, competitive LECs do not have the extensive experience in rate regulation that incumbents have, nor are they necessarily likely to have the cost records appropriate for rate proceedings. Nor do they have the resources necessary to effectively participate in rate proceedings. Accordingly, as the Commission has already determined for reciprocal compensation generally,²⁰ it makes the most sense for TELRIC rates to be set using incumbent LEC costs.

¹⁹ *Local Competition Order*, para. 1085.

²⁰ *Id.*

Focal also urges the Commission to adopt the feature of its current reciprocal compensation requirements that permits competitive LECs to rebut the presumption of symmetrical rates and demonstrate that they have higher rates. This safeguard will assure that intercarrier compensation rates for ISP-bound traffic are appropriate for both parties.

The Commission should also explicitly preempt states that may be embarking on an examination of competitive LEC costs. Some incumbent LECs have urged some state commissions to do so.²¹ For the reasons stated above, Focal believes that this is neither necessary nor feasible. Accordingly, the Commission should preempt any state proceedings that may be taking this approach unless, as noted, they are part of a competitive LEC's efforts to rebut the presumption of symmetry of intercarrier compensation for ISP-bound traffic.

VIII. RATE STRUCTURE GUIDELINES

Focal believes that the rate structure guidelines that the Commission adopted in the *Local Competition Order* for reciprocal compensation should also be applied to ISP-bound traffic. There, the Commission determined that rates must reflect the way that costs are incurred and that states may,²² but are not required to, set rates that vary according to whether traffic is routed through a tandem switch or directly to an end office.²³ The Commission also determined that in situations where the switch technology employed by the new entrant performs functions similar

²¹ See "Petition of Bell Atlantic-New York to Re-Open Case 97-C-1275" March 2, 1999, Proceeding on Motion to the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Case 97-C-1275, New York Public Service Commission.

²² *Local Competition Order*, para.1063.

²³ *Id.* para. 1090.

to a tandem or where the new entrant's switch serves a geographic area comparable to a tandem, the new entrant shall receive the tandem termination rate.²⁴ Focal submits that these requirements will assure that any rates set by states will promote efficient pricing. Thus, states would not be able to set rates that create market distortions and permit inefficient entry by permitting cost recovery in ways that are substantially different than the way that costs are incurred. And, competitive LECs will receive comparable rates where they perform the same switching functions as incumbent LECs.

The Commission should also apply to ISP-bound traffic its determination in the *Local Competition Order* that most of the costs involved in reciprocal compensation, once a call has been delivered to an end office, consists primarily of the traffic sensitive component of local switching.²⁵

IX. INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC SHOULD BE THE SAME AS FOR TRAFFIC SUBJECT TO SECTION 251(b)(5).

As noted, a competitive LEC's costs of transporting and "terminating" a call to an ISP is no different than the costs of "terminating" other calls to other customers. A competitive LECs' costs do not vary significantly based on whether data or voice traffic is being transmitted.

Further, the jurisdictional nature of ISP-traffic should be irrelevant to intercarrier compensation for this traffic. Focal submits that the TELRIC costs of originating or terminating long distance calls experienced by competitive and incumbent LECs are no different than, and are functionally the same as those functions when performed for local calls. Focal submits that

²⁴ *Id.*

²⁵ *Id.* para. 1057.

different pricing for ISP-bound traffic and local traffic would skew investment decisions by both incumbent and competitive LECs, encourage arbitrage, and hinder the development of an efficient telecommunication network.

Moreover, ISP-bound traffic has been treated as local traffic by regulators and the industry. In the *Dial-Up Order*, the Commission noted that for purposes of application of access charges, it has treated ISP-bound traffic as local.²⁶ Similarly, the Commission pointed out that incumbent LECs treat these calls as local for separations purposes.²⁷ Moreover, dial-up calls to ISPs have the same technical call-completion characteristics as any other local call, incumbent LECs charge its customers local rates for these calls, ISPs have local telephone numbers, and ISPs premises where the calls are handed off are in the local calling area. Thus, dial-up calls to ISPs are local calls for regulatory purposes, save jurisdiction, as well as a practical matter. Accordingly, Focal urges the Commission to establish as one of its federal pricing guidelines that intercarrier compensation rates, rate structures, and other requirements applicable to ISP-bound traffic must be the same as reciprocal compensation for local traffic generally.

Focal also emphasizes that the Commission must reject any incumbent LEC requests in this proceeding that intercarrier compensation for ISP-bound traffic must be treated in the same manner as interstate access traffic. As noted by the Commission itself in the *Dial-Up Order*, this option is not available because the "ESP exemption" precludes assessment of interstate access

²⁶ *Dial-Up Order*, para. 23.

²⁷ *Dial-Up Order*, n. 76. An incumbent LEC at one point announced an intention to unilaterally reclassify this traffic as interstate in order to support its position concerning reciprocal compensation. Letter from SBC Communications, Inc. to Ken Moran, Chief, Accounting and Audits D. Communications Commission, January 20, 1998.

charges.²⁸ Therefore, interstate access charge revenue is not available to carriers to form the basis of intercarrier compensation for this traffic. The Commission should not use this proceeding as a backdoor approach to rescinding the "ESP exemption."

Focal also points out that the Commission has no substantial basis for concluding that any particular amount of ISP-bound traffic is jurisdictionally interstate. The Commission may receive comments in this proceeding repeating cliches to the effect that the Internet is a "global medium of communications – or 'cyberspace' -- that links people, institutions, corporations and governments around the world."²⁹ These commenters conveniently forget that the voice network is also a "global medium of communications" "that links people, institutions, corporations and governments around the world" but that this does not justify an unsupported assumption that this traffic is mostly jurisdictionally interstate. Focal submits that a far greater percentage of ISP-bound traffic is jurisdictionally intrastate, and even local, due to "caching" and "mirroring" of Internet sites, than the Commission has been assuming, without support, is the case. Moreover, many ISPs provide services that do not involve Internet access such as Intranet and corporate network management services. These services involve the competitive LEC handling ISP-bound calls that do not always involve connection to the Internet. Indeed, some corporations want to assure that its Intranet and corporate networks do not provide Internet access. Thus, it

²⁸ *Dial-Up Order*, para. 9.

²⁹ Ameritech Opposition, GTE Operating Cos., CC Docket No. 98-79, at 12, *citing Internet Over Cable: Defining the Future in Terms of the Past*, FCC Office of Plans and Policy Working Paper No. 30, Aug. 1998, at 6.

may well be appropriate to treat as ISP-bound traffic as local because much of it, in fact, is local under the Commission's end-to-end jurisdictional analysis.

X. THE FCC HAS AUTHORITY TO PROVIDE FOR STATE SUPERVISION OF INTERCARRIER COMPENSATION PURSUANT TO FEDERAL GUIDELINES

Focal submits that states have authority under Sections 251 and 252 to conduct arbitrations concerning intercarrier compensation for ISP-bound traffic even though, in the Commission's estimation, most of this traffic is jurisdictionally interstate. As the Commission found in the *Local Competition Order*, Congress in the 1996 Act created a new jurisdictional regulatory regime in which, under Sections 251 and 252, some interstate matters normally subject to FCC jurisdiction are subject to state authority, and *vice versa*.³⁰ Thus, states under Section 251 may govern matters concerning interstate communications to the extent they are otherwise within the scope of Section 251.

Further, Section 252(a) does not contain any limits on matters that parties may include in their voluntary interconnection agreements or that states may arbitrate. In fact, that section says that parties may enter into a binding agreement without regard to the standards set forth in subsections (b) and (c). One of those subsections is 251(b)(5) concerning reciprocal compensation. Thus, notwithstanding that the Commission believes that ISP-bound traffic is not subject to Section 251(b)(5) because it does not (in the Commission's view) terminate locally, parties may negotiate intercarrier compensation for it. And, by the same token, pursuant to the direct language of Section 252(b)(1) and (2), states may mediate or arbitrate those negotiations

³⁰ *Local Competition Order*, para.83.

concerning this traffic. Therefore, Focal submits that there is little question that Congress gave states authority to arbitrate intercarrier compensation for ISP-bound traffic, even assuming that the FCC is correct that such traffic is not subject to reciprocal compensation under Section 251(b)(5).

Moreover, it would provide for the most efficient administration of interconnection agreements under the Act to provide that states may arbitrate any matters that it is appropriate for interconnection agreements to contain. Focal submits that it would make little sense for the states to arbitrate reciprocal compensation for local traffic and the Commission to arbitrate intercarrier compensation for ISP-bound and access traffic. Parties negotiate comprehensively all aspects of their interconnection relationship and it would not be practical for the Commission, state arbitrators, and the parties to try to coordinate simultaneous federal and state negotiations and arbitrations so that a comprehensive agreement could be achieved. Moreover, state and federal arbitrators might reach different or inconsistent outcomes which would probably result in endless rounds of further negotiations or litigation.

Rather, it will be most efficient for states to arbitrate all matters within the scope of interconnection agreements, including intercarrier compensation for ISP-bound traffic and access traffic, even if jurisdictionally interstate, pursuant to federal guidelines. This will permit the Commission to assure that its goals for interstate communications are met and that the goals of the Act are achieved and also permit an efficient administration of arbitrations. Accordingly, the Commission should conclude in this proceeding that states have authority under Section 252 of the Act to arbitrate intercarrier compensation for ISP-bound traffic.

XI. OPT-IN RIGHTS

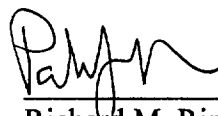
In the NPRM, the Commission solicited comment on the extent to which parties may opt-in to interconnection agreements pursuant to Section 252(i)³¹ and to reset the term for that interconnection agreement so that it runs for its full term from the date of the opt-in.³² Focal urges the Commission to strongly affirm new entrants' right to opt-in to existing interconnection agreements, or portions thereof, pursuant to Section 252(i). Focal submits that the Commission should permit opting-in to existing agreements for the balance of the term of such agreements. This approach would best balance the interests of incumbent LECs and the rights of competitive LECs to opt-in to existing agreements under Section 252(i).

XII. CONCLUSION

For these reasons, the Commission should adopt the recommendations set forth in these Comments.

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276657.1

³¹ 47 U.S.C. Section 252(i).

³² *NPRM*, para. 35.

CERTIFICATE OF SERVICE

I, Candise M. Pharr, hereby certify that on this 12th day of April 1999, copies of the foregoing Comments of Focal Communications Corporation were delivered by hand and first class mail to the following:

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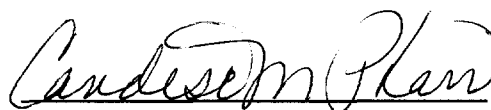
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